

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LIBERTY MUTUAL FIRE INSURANCE)	
CO., and UNITED PARCEL SERVICES, INC.,)	
)	
Plaintiffs/Petitioners,)	IC 01-509281
)	
v.)	
)	
CURTIS HALL,)	ORDER REGARDING
)	SUBROGATION
)	
Defendant/Respondent.)	Filed July 15, 2005
)	

INTRODUCTION

On February 11, 2005, the above-named Plaintiffs (hereinafter Petitioners) filed a Complaint with the Industrial Commission alleging that Defendant (hereinafter Respondent) has failed to properly honor Petitioners' subrogation interest in violation of Idaho Code § 72-223. The Commission issued an Order Denying Hearing and Establishing Briefing Schedule on April 15, 2005. Petitioners filed their Opening Brief on May 11, 2005. Respondent filed a brief on June 7, 2005, accompanied by a Memorandum of Attorneys Fees and Costs. Petitioners' Reply Brief was filed on June 10, 2005.

CONTENTIONS OF THE PARTIES

Petitioners contend they are entitled to funds from Respondent due to an unfulfilled subrogation interest pursuant to Idaho Code § 72-223. In an attempt to settle the subrogation interest, the parties entered into an agreement whereby Petitioners would receive \$9,000.00 from a \$25,000.00 third-party settlement achieved by Respondent. In turn for giving up their remaining subrogation interest, Respondent agreed to waive all future rights to Title 72 benefits through the signing of a Lump Sum Settlement Agreement. Petitioners contend that this Lump Sum Settlement Agreement was not approved by the Commission, thus leaving them open to

future Title 72 liability and voiding any agreement to diminish Petitioners' subrogation interest. Petitioners, therefore, argue they should be awarded the remaining portion of the third-party settlement proceeds, less the \$9,000.00 already received. Petitioners also argue that if Respondent is due any attorney fees, the Commission take into account the \$4,043.45 Respondent's attorney withheld as fees and costs on the \$16,000.00 Respondent was awarded as part of the \$25,000.00. In sum, Petitioners ask the Commission to award them \$11,956.55 to satisfy their unmet subrogation interest.

Respondent counters by arguing the legal principle of accord and satisfaction. Respondent contends he executed the Lump Sum Settlement Agreement on July 8, 2004. Even though the Commission did not approve the agreement, Respondent argues the parties have still entered into an accord in satisfaction as evidenced by Petitioners' receipt of the \$9,000.00 and agreement to the Lump Sum Settlement Agreement.

In the alternative, Respondent raises a statute of limitation defense. He argues Petitioners should be barred from pursuing their subrogation claim as they failed to file suit within two years as required by Idaho Code § 5-219.

In response, Petitioners maintain that there has been no accord and satisfaction as the Lump Sum Settlement Agreement was never approved. Therefore, Petitioners did not receive the waiver of Title 72 benefits they desired. Petitioners are still responsible for any continuing workers' compensation benefits. Petitioners contend their subrogation interest is fixed under Idaho Code § 72-223 and not affected by Respondent's statute of limitation argument. Finally, Petitioners raise the principle of 'first dollar recovery' as outlined in *Hall v. Young's Dairy Products Company*, 98 Idaho 562, 564, 569 P.2d 907 (1977); *Liberty Northwest Ins., v.*

Crawford, IC 01-501192; and *Charters v. Barrett Trucking & Insurance Co., of the West*, IC 15-000061 (2003).

DISCUSSION

It is undisputed that Respondent suffered a compensable, work-related injury. Petitioners contend they have paid \$119,807.09 in benefits to Respondent. Respondent contends that he has received \$119,333.69 in benefits. Either way, Petitioners' subrogation interest under Idaho Code § 72-223 is significant.

Under § 72-223, Petitioners have an ultimate right to recover their subrogation interest. Petitioners are entitled to 'first dollar' on any third-party recovery until their subrogation interest is satisfied. *Hall v. Young's Dairy Products Company*, 98 Idaho 562, 564, 569 P.2d 907 (1977); *Liberty Northwest Ins., v. Crawford*, IC 01-501192; and *Charters v. Barrett Trucking & Insurance Co., of the West*, IC 15-000061 (2003).

Respondent is in error when he argues that an accord and satisfaction has been created by the parties. The Lump Sum Settlement Agreement was never approved by the Commission and was thus never legally binding. Petitioners did not receive the waiver of future Title 72 benefits they negotiated and bargained as part of the Lump Sum Settlement Agreement. Therefore, the terms of the agreement were not satisfied. Respondent did attempt to satisfy the subrogation interest with the \$9,000.00 to Petitioners, but because the Lump Sum Settlement Agreement was not approved, Petitioners never received the waiver. Therefore, there has been no accord and satisfaction.

Respondent is also in error when he argues Petitioners are barred by a statute of limitations under Idaho Code § 5-219. Petitioners' absolute right to subrogation arises from Idaho Code § 72-223 and does not rest on suit being filed. When Respondent filed suit against

the third party, he was filing suit on behalf of Petitioners whether he did so intentionally or not. The third-party lawsuit is the one that might have been affected by § 5-219, not this current claim for reimbursement. Petitioners' current claim arises under a subrogation right to any funds collected by Respondent. Respondent is essentially holding the funds in trust until they can be distributed to Petitioners pursuant to the reimbursement right guaranteed by the subrogation language of §72-223. Furthermore, § 5-219 regards proceedings in civil actions, not proceedings before the Industrial Commission.

Regarding attorney fees, Respondent's attorney is entitled to reasonable fees for his work in procuring the third-party settlement. Pursuant to Respondent's Memorandum of Attorneys Fees and Costs, it is apparent that Respondent's attorney has withheld the sum of \$4,043.45 for fees and costs in the recovery of \$16,000.00 for Respondent. As Petitioners are entitled to recover their full subrogation interest in this matter, equating to the \$25,000.00 third-party settlement, Respondent is entitled to fees on the full \$25,000.00, not just the \$16,000.00. Pursuant to § 72-223, Petitioners must have a proportionate share of fees subtracted from their subrogated interest. The Commission finds 25% to be a reasonable fee. Therefore, Respondent's attorney shall be entitled to a reasonable attorney fee of \$6,250.00.

Petitioners request attorney fees as well. The Commission finds an award of such fees to be inappropriate as there was no hearing on this matter since the issue was decided on the briefs.

Petitioners have already received \$9,000.00 of the \$25,000.00. Considering \$9,000.00 as a credit and \$6,250.00 as reasonable fees for obtaining the third-party settlement of \$25,000.00, Petitioners are still owed the sum of \$9,750.00 of their subrogation interest pursuant to Idaho Code § 72-223.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED That Respondent shall remit the sum of \$9,750.00 to Petitioners' attorney of record to satisfy the subrogation interest pursuant to Idaho Code § 72-223.

DATED this __15th day of ____July_____, 2005.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
James F. Kile, Commissioner

____/s/_____
R.D. Maynard, Commissioner

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __15th__ day of ____July____, 2005, a true and correct copy of the foregoing **ORDER REGARDING SUBROGATION** was served by regular United States Mail upon each of the following persons:

MONTE R. WHITTIER
6213 N. Cloverdale Rd., Ste. 150
P.O. Box 6358
Boise, ID 83707-6358

D. KIRK BYBEE
P.O. Box 6097
Pocatello, ID 83205-6097

____/s/_____